No. 45149-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

RICHARD L. IRWIN,

Appellant

v.

NORTHWEST TRUSTEE SERVICES, INC., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a/k/a MERSCORP, EMC MORTGAGE CORPORATION, WELLS FARGO BANK, N.A., SUCCESSOR BY MERGER TO WELLS FARGO BANK MINNESOTA, N.A., f/k/a NORWEST BANK MINNESOTA, N.A. SOLELY AS TRUSTEE FOR STRUCTURED ASSET MORTGAGE INVESTMENTS II TRUST 2007-AR4, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2007-AR4, JP MORGAN CHASE BANK, N.A.,

Respondents.

Appeal from Superior Court for Pierce County
The Honorable Susan Sirko

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Judicial estoppel should not be imposed in this case in regard to Appellant's bankruptcy schedules. Since Appellant had no knowledge of the facts to know whether a potential cause of action existed during the pendency of the bankruptcy (2011), it would have been impossible for him to identify claims against MERS or the other defendants on his bankruptcy schedules.

Even if all defendants acted lawfully, their actions had the capacity to deceive Appellant as well as a large portion of the public, so their actions violate the Consumer Protection Act. In addition, a Trustee cannot take the actions of a successor trustee until an appointment of successor trustee is recorded, and any claims that an agency relationship permits NWTS to issue a Notice of Default are in violation of the Consumer Protection Act and the Deed of Trust Act, which does not allow a trustee to contract around a statute.

Appellant suffered damages, as alleged in the complaint, in the form of damage to credit, loss of access to credit, loss of business opportunity, legal fees and costs for stopping a foreclosure, and actual/compensatory damages, so Appellant has met all elements for

stating a claim for violation of the Consumer Protection Act, fraud and misrepresentation, Breach of Contract and covenant of good faith and fair dealing, and violation of the Deed of Trust Act. This case should be remanded to the Superior Court for further discovery, as Appellant has stated a claim on every count.

II. LEGAL ARGUMENT

A. MR. IRWIN'S BANKRUPTCY SCHEDULES SHOULD NOT PRECLUDE HIM FROM BRINGING AN ACTION IN COURT ON CIVIL CLAIMS RELATED TO THE DEED AND THE TRUSTEE'S SALE

Defendants toss around various federal cases hoping to buttress their position that Appellant is judicially estopped from bringing civil claims related to his title because he did not list MERS and the other defendants as a potential lawsuit on his bankruptcy schedules. The *Hamilton* case is the pre-eminent case in the 9th Circuit dealing with judicial estoppel vis-a-vis bankruptcies and addresses issues that are on-point for the case at bar.

In *Hamilton*, the court held that "Judicial estoppel will be imposed when the debtor has knowledge of enough facts to know that a potential cause of action exists during the pendency of the bankruptcy, but fails to amend his schedules or disclosure statements to identify the cause of action as a contingent asset." *Hamilton v. State Farm Fire &*

Cas. Co., 270 F.3d 778, 784 (9th Cir. 2001). The essential point in this holding, and the rationale from which the court proceeds, is that the debtor *has knowledge of enough facts to know that a potential cause of action exists during the pendency of the bankruptcy*. As explained in Appellant's Opening Brief, the facts in the case at bar differ significantly from the facts in the *Hamilton* case, but the Hamilton test must be applied.

The *Hamilton* case was based on facts involving a potential insurance claim against State Farm. Insurance claim law is one of the most ubiquitous and well-developed areas of law that is well known even to a layperson in many respects. Foreclosure litigation against MERS and financial institutions, however, is a very narrow, recent, and swiftly changing area of law that just began to develop since the economic collapse of 2007-2008, and varies from state to state depending on the state laws at issue. Appellant could have no way of knowing that he may have a potential claim against MERS and the other defendants in 2011 when he filed his bankruptcy case. Even under the holdings of the cases cited by defendants, the fact remains that it would be absurd on its face to presume that a person could list something on a bankruptcy schedule of which they had no knowledge. The Supreme Court decision in *Bain v.*

Metropolitan Mortgage wasn't even issued until 2012 and even that decision left certain issues in limbo.

Simply because Appellant had a number of real estate loans does not mean that he is a sophisticated borrower. Appellant is not a real estate financing specialist, real estate professional, or legal professional. He simply borrowed money on a number of properties just like countless others during the same time period. This does not make one an expert or sophisticated borrower. The implication to that effect raised by defendants is grossly misguided. If their intent was to imply that somehow Appellant should have known facts about claims against MERS and the other defendants when filing his bankruptcy schedules because he borrowed money for several properties, this implication is misplaced and should have no bearing on the fact that he had no knowledge of claims against these defendants when filing his bankruptcy schedules in 2011.

B. DEFENDANTS VIOLATED THE CONSUMER PROTECTION ACT

1. *Northwest Trustee Services, Inc. Violated the Consumer Protection Act*

Whether or not the Appointment of Successor Trustee was recorded before or after the NOD was issued, NWTS violated the Consumer Protection Act. Appellant argued in his opening brief that by acting as an *agent* for a beneficiary, the trustee has violated the Deed of

Trust Act and the Consumer Protection Act because an agent owes a duty of loyalty to its principle, thus NWTS cannot act as a neutral in an impartial manner, as required by the Deed of Trust Act when carrying out its duties as a Trustee on a Deed of Trust. Issuing a Notice of Default under its status as an "agent" for a beneficiary before an Appointment of Successor Trustee has been recorded violates the Deed of Trust Act. It also violates the Consumer Protection Act because Appellant is entitled to rely on the presumption that the Trustee is complying with the law, and when it fails to do so, it is acting in an unfair and deceptive manner.

It is not enough to argue that NWTS can act as an agent in issuing a Notice of Default because they believe they are authorized to do so under RCW 61.24.031. It should be patently clear that this is deceptive. Northwest Trustee Services, Inc. is a well-known, high-volume foreclosure enterprise operating in Washington, Oregon, California, Alaska, Idaho, and Arizona that engages in mass-processing of residential foreclosures as a trustee on deeds of trust in these states. It is in the financial interests of NWTS to ignore the law and process foreclosures as quickly as possible, and attempt a post hoc rationalization of their actions hoping to shoehorn their position into the legal parameters as they see fit. When a Notice of Default is received by a homeowner emblazoned with the name of Northwest Trustee Services, Inc., the homeowner concludes

that this is the foreclosure trustee who will be performing the foreclosure, not that NWTS is acting in an agent capacity before it becomes a lawful successor trustee. The same issue was raised by Appellant in a similar case before this court, Irwin v. Northwest Trustee Services, et al., No. 45037-2-II.

The Consumer Protection Act can be violated even if the actions taken are lawful or accurate but have the capacity to deceive a large portion of the public. Even accurate information may be deceptive "if there is a representation, omission or practice that is likely to mislead." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wash.2d 27, 50, 204 P.3d 885 (2009) (quoting *Sw. Sunsites, Inc. v. Fed. Trade Comm'n,* 785 F.2d 1431, 1435 (9th Cir. 1986)). In *Klem v. Washington Mutual Bank*, the Supreme Court held that, "To resolve any confusion, we hold that a claim under the Washington CPA may be predicated upon a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute, but in violation of public interest." *Klem v. Washington Mutual Bank*, No. 87105-1, Slip Op. 16 (Feb. 28, 2013).

In *Walker v. Quality Loan Services*,[1] Mr. Walker raised claims that the Trustee and the servicer violated the CPA. The facts of that case are similar to the facts in the present case. "(1) Quality sent a *notice of default* to Mr. Walker even though it did not meet the requirements of a successor trustee; (2) Quality and Select facilitated a deceptive and misleading effort to wrongfully execute and record documents that contained false statements related to the Appointment of Successor Trustee and Assignment of Deed of Trust; … and as a result of this conduct, Quality and Select knew that their conduct amounted to wrongful foreclosure…" *Walker* at 24 (emphasis added). These are virtually identical facts as the present case. The actions flowing from that unlawful appointment should also be considered unfair and deceptive and impacting the public interest.

2. *MERS, JP Morgan Chase, Wells Fargo, and SAMI II Violated the Consumer Protection Act*

MERS' actions were unfair and deceptive when it unlawfully made an assignment of the Deed of Trust to Wells Fargo as Trustee for SAMI II 2007 AR-4. MERS' actions were also unfair and deceptive when it declared itself to be the beneficiary on the Deed of Trust. Since MERS had no interest to transfer, it was incapable of making an

[1] *Walker v. Quality Loan Service Corp.*, ___ Wn. App. ___ 308 P.3d 716 (No. 65975-8-

assignment of the Deed of Trust to J.P. Morgan Chase, Wells Fargo or anyone else. Not only is MERS, a fraudulent beneficiary, making a fraudulent transfer, it is causing the Deed of Trust to end up in the hands of an unlawful and unauthorized party.

The Court in *Walker* held that violations of the Deed of Trust Act of having unlawful beneficiaries appointing unlawful successor trustees to initiate foreclosure proceedings, and which rendered the foreclosure void or voidable, may constitute unfair and deceptive acts under the CPA. *Walker* at 25. It is clear from the *Bain* decision that a party cannot contract around a statute. If unlawful beneficiaries appointing unlawful successor trustees to initiate foreclosure proceedings can constitute unfair and deceptive acts under the CPA, then the unlawful actions of the unlawful trustee should also be considered unfair and deceptive under the CPA.

JP Morgan Chase and EMC's actions as the servicers were unfair and deceptive when they utterly failed to provide Mr. Irwin a permanent loan modification when all three trial payment plans were timely made as agreed. *Corvello v. Wells Fargo Bank*, No. 11-16234, No. 11-16242, 2013 WL 4017279 at *1 (9th Cir. Aug. 8, 2013).

Defendant Wells Fargo as Trustee for SAMI-II 2007 AR-4 acted in an unfair and deceptive manner when it unlawfully claimed to be the

beneficiary when the closing date and the cutoff date of the security was long before the Assignment was made from MERS, even if the MERS assignment was found to be valid. Pursuant to RCW 61.24.020, a deed of trust is subject to all laws relating to mortgages on real property. An assignment of a mortgage is not effective until recording. RCW 61.16.020; see *Price* v. *Northern Bond & Mortg. Co.,* 161 Wash. 690, 696, 297 P. 786 (Wash. 1931) (where the assignment of a mortgage is not recorded, purchaser has right to assume no assignment has been made).

In *Reinagel v. Deutsche Bank National Trust Co.* (5th Cir., July 11, 2013, No. 12-50569) __ F.3d __ [2013 WL 3480207, p. *3], the court followed the majority rule that an obligor may raise any ground that renders the assignment void, rather than merely voidable. Under New York Trust Law, every sale, conveyance or other act of the trustee in contravention of the trust is void. EPTL §7-2.4. Therefore, the acceptance of the note and mortgage by the trustee after the date the trust closed, would be void. *Wells Fargo Bank, N.A. v. Erobobo* (N.Y.Sup.Ct. 2013) 39 Misc.3d 1220(A), 2013 WL 1831799, p. 8; see Levitin & Twomey, *Mortgage Servicing, supra*, 28 Yale J. on Reg. at p. 14, fn. 35 [under New York law, any transfer to the trust in contravention of the trust documents is void].

The First Circuit in *Culhane v. Aurora Loan Services of Nebraska* held that that a mortgagor has standing to challenge the assignment of a mortgage on her home to the extent that such a challenge is necessary to contest a foreclosing entity's status qua mortgagee. *Culhane v. Aurora Loan Services of Nebraska*, (1st Cir. 2013) 708 F.3d 282, 291. The court based its holding on the finding that "there is no principled basis for employing standing doctrine as a sword to deprive mortgagors of legal protection conferred upon them under state law." *Id.*

The First Circuit also held in *Woods v. Wells Fargo Bank, N.A.* that "standing exists for challenges that contend that the assigning party never possessed legal title and, as a result, no valid transferable interest ever exchanged hands. *See U.S. Bank Nat'l Ass'n v. Ibanez,* 458 Mass. 637, 651, 941 N.E.2d 40, 53 (2011) ("[T]here must be proof that the assignment was made by a party that itself held the mortgage.")." *Woods v. Wells Fargo Bank, N.A.,* 733 F.3d 349 (2013) at 354.

In *Glaski v. Bank of America, N.A.*, 218 Cal. App. 4th 1079 (2013), the court found that the borrower may have standing to question the legitimacy of a transfer of a note into a securitized trust. *Glaski*, 218 Cal. App. at 1095. The court held that "We reject the view that a borrower's challenge to an assignment must fail once it is determined that the borrower was not a party to, or third party beneficiary of, the assignment

agreement. Cases adopting that position "paint with too broad a brush." (*Culhane v. Aurora Loan Services of Nebraska*, *supra*, 708 F.3d at 290). Instead, courts should proceed to the question whether the assignment was void." *Glaski* at 1095.[2] The court's reasoning was not solely based on interpretation of California laws, but on the reasoning of federal courts. The transaction may be void if, *inter alia*, the rules surrounding the formation of the trust were not strictly followed. In *Glaski*, the court found there was a cause of action and a material issue of fact as to whether the note in question was transferred into the trust in a timely fashion. *Id.*

The reasoning in *Glaski* follows the current trend in the federal courts to allow borrower challenges to assignments and transfers. "Where an assignment is merely voidable at the election of the assignor, third parties, and particularly the obligor, cannot…successfully challenge the validity or effectiveness of the transfer." (7 Cal.Jur.3d (2012) Assignments, §43, p. 70)." Quoted in *Glaski* at 1094-1095. The *Glaski* court also held that:

> The statement implies that a borrower can challenge an assignment of his or her note and deed of trust if the defect asserted would *void* the assignment. (See *Reinagel v. Deutsche Bank National Trust Co.* (5th Cir., July 11, 2013, No. 12-50569) __ F.3d __ [2013 WL 3480207, p. *3]

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[2] *Culhane v. Aurora Loan Services of Nebraska* (1st Cir. 2013) 708 F.3d 282, 291. ("We think that these cases paint with too broad a brush.")

> [following majority rule that an obligor may raise any ground that renders the assignment void, rather than merely voidable].) We adopt this view of the law and turn to the question whether Glaski's allegations have presented a theory under which the challenged assignments are void, not merely voidable."

Glaski, at 1095. The court additionally held that, because securitized trusts are governed by New York statutes, applying those statutes "to void the attempted transfer is justified because it protects the beneficiaries of the ...Trust from the potential adverse tax consequence of the trust losing its status as a REMIC trust under the Internal Revenue Code… we join the position stated by a New York court approximately two months ago: 'Under New York Trust Law, every sale, conveyance or other act of the trustee in contravention of the trust is void. EPTL §7-2.4. Therefore, the acceptance of the note and mortgage by the trustee after the date the trust closed, would be void.' (*Wells Fargo Bank, N.A. v. Erobobo* (N.Y.Sup.Ct. 2013) 39 Misc.3d 1220(A), 2013 WL 1831799, p. 8; see Levitin & Twomey, *Mortgage Servicing, supra*, 28 Yale J. on Reg. at p. 14, fn. 35 [under New York law, any transfer to the trust in contravention of the trust documents is void].)" *Glaski* at 1097. The court concluded that the entity holding the power of sale (the trustee for the securitized trust) was not the holder of the Glaski deed of trust. *Id.*

Plaintiff stated claims against these defendants based on these facts, which were clearly laid out in the complaint, upon which relief can be granted. A FRCP 12(b)(6) motion only tests the sufficiency of the pleadings, and the court does not decide whether Plaintiff has come forward with proof in this type of motion.

C. DEFENDANTS ARE LIABLE FOR COMMON LAW FRAUD AND MISREPRESENTATION

In reply to Respondents' arguments in response to this appeal, Appellant re-states his arguments from his opening brief on this claim. The specific fraudulent acts of the respondents were sufficiently stated in the Complaint, and a 12(b)(6) motion merely tests the sufficiency of the complaint. It does not invoke the question whether Plaintiff/Appellant has come forward with proof of the claims, and all allegations made in the Complaint are taken as true by the court when reviewing a 12(b)(6) dismissal. The fraudulent acts of respondents were also set forth and legal analysis provided in Appellant's opening brief, and will not be restated here in the interests of brevity and judicial economy.

D. DEFENDANTS BREACHED THE COVENANT OF GOOD FAITH-FAIR DEALING

Respondents engaged in bad faith by attempting to foreclose when they had no legal right to do so. Since the transfer into the securitized trust was made after both the closing date and the cutoff date of the trust

pool, the transfer is void and SAMI II is not the owner of the note. Even if the court agrees that Wells Fargo and SAMI II have some right to the note as bearer paper, the only right they may have would be to attempt to collect on the note, but not foreclose on the property. In order for the mortgage loan and Note to have been properly conveyed into the pool, the Note should have been properly endorsed by all intervening parties from the originator, American Home Mortgage Acceptance, Inc., to the Trustee, Wells Fargo Bank, N.A.

The Note should therefore bear a minimum of three endorsements since American Home Mortgage Acceptance, Inc. did not sell the loan directly to the trustee, Wells Fargo Bank, N.A. The Note does not bear three such endorsements, and a Note with no endorsements or just one endorsement in blank fails to meet the minimum requirements of the Pooling and Servicing Agreement. Because of the fraud and misrepresentation committed by these defendants, they do not have lawful interests in the note and deed of trust that empowers them to foreclose on the property.

E. THE COURT SHOULD HAVE GRANTED LEAVE TO AMEND THE COMPLAINT

A plaintiff may amend his pleading by leave of court, which "leave shall be freely given when justice so requires." CR 15(a). "Rule 15 of the Federal Rules of Civil Procedure, from which CR 15 was taken,

'was designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result.'" *Caruso v. Local Union No. 690,* 100 Wn.2d 343, 349, 670 P.2d 240 (1983). Defendants still cannot show prejudice in this case if Appellant had been granted leave to amend the complaint.

The Supreme Court has held that the fact that the added claims could have been included in the original pleading will not preclude amendment in the absence of prejudice to the nonmoving party. *Herron v. Tribune Pub'g Co.,* 108 Wn.2d 162, 166, 736 P.2d 249 (1987). Similarly, mere delay, if not accompanied by prejudice to the nonmoving party, is insufficient to justify denial. *Caruso,* 100 Wn.2d at 350-351, 670 P.2d 240 (1983). There was clearly no delay in this case as Appellant requested amendment in 12(b)(6) proceedings.

Justice requires that the Court allow Complaint to be amended and none of the defendants/respondents would be prejudiced by the proposed amendments. The court was in error in failing to grant leave to amend the complaint.

IV. CONCLUSION

Accordingly, this Court should reverse the trial court order granting the motion to dismiss, and remand for further proceedings

consistent with the Court's opinion. Attorney's fees and costs on appeal should be awarded to Appellant.

Signed and dated this 26th day of March, 2014.

/s/ *Jill J. Smith*
Jill Smith, WSBA #41162

CERTIFICATE OF SERVICE

I certify under penalty of perjury that the attached document was served upon the Court of Appeals for Division I, and properly served to the counsel listed below, on March 26, 2014.

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